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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

DAAUS FUNDING, LLC, Plaintiff and Appellant, v. VADIM JEFF MIRONER et al., Defendants and Respondents.	B285687 (Los Angeles County Super. Ct. No. BC469595)

APPEAL from an order of the Superior Court of Los Angeles County. Thomas Trent Lewis, Judge. Affirmed.

Law Offices of Dan Maccabee and Dan S. Maccabee for Plaintiff and Appellant.

Garrett & Tully, Ryan C. Squire, Zi C. Lin, and Motunrayo D. Akinmurele for Defendants and Respondents.

* * * * * *

A lender with a lien secured by an interest in a parcel of property obtained a judgment ordering foreclosure and sale of that interest so it could collect its $775,000 debt plus contractual interest and attorney fees. The homeowner appealed and posted a $500,000 appellate bond to stay any foreclosure and sale during the pendency of its appeal. After the judgment was largely affirmed, the homeowner paid the lender more than $2 million to cover the debt, pre- and post-judgment interest and attorney fees, which together obviated any need for foreclosure and sale. The lender nevertheless sought to collect the full amount of the $500,000 bond. The trial court rejected its request. Because this was undeniably correct, we affirm.

FACTS AND PROCEDURAL BACKGROUND

This action concerns the ownership of a six-bedroom mansion in the Post Office neighborhood of Beverly Hills (the Property).

In 2010, a woman named Adela Gregory Ohanesian (Ohanesian) borrowed $775,000 from Daaus Funding, LLC (Dauus). The loan was secured by a deed of trust against Ohanesian's "'50% undivided interest as [a] tenant[] in common'" of the Property. Several months later, Ohanesian and her ex-husband—who were in the midst of protracted dissolution proceedings—sold the Property to Vadim Jeff and Luba Mironer (the Mironers). The Mironers moved in, and the Property became their primary residence.

Daaus and the Mironers sued each other regarding the continued validity of Daaus's deed of trust. The trial court determined that Daaus's lien was still valid and issued a judgment ordering the sale and foreclosure of the Property "as to [the] 50% undivided interest" securing Daaus's lien. The court

calculated the amount of Daaus's lien (along with interest, attorney fees and a penalty) to be $1,916,850.49 as of March 2, 2015, and specified that post-judgment interest would accrue at a rate of 20 percent.

The Mironers appealed the judgment, and sought to stay enforcement of the judgment by posting an appellate bond pursuant to Code of Civil Procedure section 917.4.[1] The trial court fixed the bond amount at $500,000, and the Mironers posted a bond in that amount. We affirmed the trial court's ruling regarding the continued validity of Daaus's deed of trust, but ruled that the trial court's calculation of the total amount owed contained some errors. (*Daaus Funding, LLC v. Mironer* (Cal.App. Dec. 28, 2016) B263730, 2016 Cal.App.Unpub.LEXIS 9327 [nonpub. opn.].)

Less than a month after our opinion issued, the Mironers tendered Daaus a check for $2,074,585.76, which included all of the interest that had accrued during the pendency of the appeal. Daaus cashed that check, but refused to sign a document acknowledging that the Mironers' payment satisfied the judgment.

Instead, Daaus filed a motion seeking to collect the full amount of the $500,000 bond. After entertaining full briefing, the trial court denied Daaus's motion because Daaus had been "paid what [it was] owed."

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1 All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

Daaus filed this timely appeal.[2]

DISCUSSION

Daaus argues that the trial court erred in denying its motion to collect the full $500,000 appellate bond posted by the Mironers. We review orders relating to the posting and collection of appellate bonds for an abuse of discretion (see *Selma Auto Mall II v. Appellate Dept.* (1996) 44 Cal.App.4th 1672, 1682), but independently review any subsidiary legal questions, including those involving statutory interpretation (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432).

I. Pertinent Law

The general rule is that "the perfecting of an appeal" from a trial court's "judgment or order" automatically "stays proceedings in the trial court" to "enforce[]" that "judgment or order." (§ 916, subd. (a); *Royal Thrift & Loan Co. v. County Escrow, Inc.* (2004) 123 Cal.App.4th 24, 35.) This general rule has several exceptions. (§§ 917.1-917.9.) One of them is when "the judgment or order appealed from directs the sale, conveyance or delivery of possession of real property which is in the possession or control of the" appealing party. (§ 917.4; *Barnes v. Chamberlain* (1983) 147 Cal.App.3d 762, 767 (*Barnes*) ["Section 917.4 is one of the express exceptions to the 'general stay' found in" section 916].) To obtain a stay pending appeal of such a judgment or order, the appealing party must (1) post a bond "in a sum fixed by the trial court," (2) promise not to "commit[] any waste" on the real property, and (3)

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2 This court granted a motion to substitute the Mironers' title insurer, First American Title Insurance Company, for the Mironers in this appeal, but we will continue to refer to the Mironers for ease of reference.

promise "that if the judgment or order appealed from is affirmed," it "shall pay [(a)] the damage suffered by the waste and [(b)] the value of the use and occupancy of the property . . . from the time of the taking of the appeal until the delivery of the possession of the property." (§ 917.4.)[3] In fixing the amount of the bond, the trial court is to set it in an amount "compatible with the potential injury which the [non-appealing party] might suffer during the period of [the] appeal." (*Vangel v. Vangel* (1953) 116 Cal.App.2d 615, 632 (*Vangel*).)

If the appeal is resolved in a manner that leaves the trial court's judgment wholly or partially intact, the non-appealing party may invoke a "summary enforcement procedure" to attempt to collect on the bond. (§ 996.440; *Grade-Way Construction Co. v. Golden Eagle Ins. Co.* (1993) 13 Cal.App.4th 826, 836.) The trial court then "determine[s]" the appealing party's and the bond surety's liability on the bond. (§ 996.460, subds. (a) & (b).)

These procedures are aimed at balancing two competing rights—namely, the right of the party prevailing before the trial court to enforce a judgment in its favor, and the right of the losing party to seek appellate review. They do so by allowing the losing party to appeal but requiring that party to post a bond that will "protect the [non-appealing party] from any loss of benefits during [the pendency of the] appeal." (*Estate of Murphy* (1971) 16 Cal.App.3d 564, 568 (*Murphy*); see *Cunningham v. Reynolds* (1933) 133 Cal.App. 148, 150-151 ["The purpose of the

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3 The appealing party's undertaking must also "provide for the payment of any deficiency" "[i]f the judgment or order" itself holds the appealing party liable for such deficiency. (§ 917.4.) The judgment here does not.

undertaking is to protect the" non-appealing party]; *Grant v. Superior Court* (1990) 225 Cal.App.3d 929, 935 [same]; *Lewin v. Anselmo* (1997) 56 Cal.App.4th 694, 700 [same].)

II. Analysis

Because the trial court's judgment directed a sale and foreclosure of the Property (as to an undivided 50 percent interest) to enable Daaus to collect on its secured debt, the judgment qualifies as a "judgment . . . direct[ing] the sale . . . of real property which is in the possession" of the appealing party (here, the Mironers) within the meaning of section 917.4. (Accord, *Hinkel v. Crowson* (1920) 182 Cal. 68, 69 [judgment directing sale to enforce a lien; covered by section 917.4's predecessor]; *Boob v. Hall* (1895) 105 Cal. 413, 414-415 [same, as to judgment directing foreclosure of mortgage]; *Bank of Woodland v. Stephens* (1902) 137 Cal. 458, 459-460; *Southern Pacific Co. v. Superior Court* (1914) 167 Cal. 250, 258-259.) Thus, the court properly required the Mironers to post a bond under section 917.4.

But the trial court did not abuse its discretion or otherwise err in denying Daaus's motion to collect on that bond. Daaus does not claim that the Property suffered any waste while the Mironers occupied it. More to the point, Daaus is not entitled to the "value of the use and occupancy" of the Property because Daaus ultimately elected to accept the Mironers' payoff of the amount owing on the deed of trust rather than to pursue foreclosure and potential eviction of the Mironers that could have entitled Daaus to possession (and thus triggered the Mironers' duty to compensate Daaus for the "value of [their] use and occupancy" of the Property during the appeal). Put differently, Daaus got precisely what it would have gotten had the Mironers

never appealed—namely, the right to collect on the judgment *either* by foreclosure *or* by accepting full payment (including interest up to and including the date of payment) in lieu of foreclosure. (*Horowitz v. Safeco Ins. Co.* (N.Y. App. Div. 1975) 50 A.D.2d 1042, 1043 [non-appealing party not entitled to collect on a bond when they "received precisely what they would have received had there been no appeal"]; accord, Civ. Code, § 2839 ["Performance of the principal obligation . . . duly made as provided in this code, exonerates a surety."]) To award Daaus the $500,000 bond *in addition to* the full payoff of the deed of trust would be to award Daaus a windfall. Where, as here, a court is sitting in equity, that court must *do* equity and "[a] court of equity does not sit to confer a windfall." (*Richardson v. Roberts* (1962) 210 Cal.App.2d 603, 608; *Lesny Dev. Co. v. Kendall* (1985) 164 Cal.App.3d 1010, 1020 ["the goal of equity is to prevent unjust enrichment"]; see also *Carpensen v. Najarian* (1967) 254 Cal.App.2d 856, 863 [judicial foreclosure is an equitable remedy]; *Barnes*, *supra*, 147 Cal.App.3d at p. 767 [court sitting in equity for underlying action affects bond collection remedy].)

Daaus resists this conclusion with four arguments.

First, Daaus asserts that it is entitled to the full $500,000 bond amount because this was the value of continued "use and occupancy" *to the Mironers* and, according to Daaus, the proper "focus" of section 917.4 is on "the value derived by [the] Mironer[s], not [the] value . . . lost by [the] [l]ender." To focus on the loss of value to Daaus, it continues, is to impermissibly transform the bond into a mechanism for awarding damages. We reject this argument. Whether a non-appealing party is entitled to collect on an appeal bond is correctly pegged to whether *that party* has suffered any loss by virtue of the delay caused by the

appeal because, as noted above, the purpose of the bond is to "protect the [non-appealing party] from any loss of benefits during [the pendency of the] appeal." (*Murphy*, *supra*, 16 Cal.App.3d at p. 568.) If there has been no loss, then the non-appealing party was fully protected without the need to collect on the bond. And this inquiry into the non-appealing party's loss does not somehow convert the bond collection proceeding into one for damages.

Second, citing the text of section 917.4, Daaus posits that automatic forfeiture of the full amount of the $500,000 bond is simply the "cost" that the Mironers must pay for the "privilege to stay the foreclosure sale." The text of section 917.4, as pertinent here, requires (1) the court to fix the bond in an amount sufficient to cover "the value of the use and occupancy of the property . . . from the time of the taking of the appeal until the delivery of the possession of the property," and (2) the appealing party to promise to pay that value should it lose on appeal. (§ 917.4) *Setting* the bond by reference to the "value of the use and occupancy" makes sense because that value encapsulates "the potential injury" the non-appealing party "might suffer during the period of the appeal." (*Vangel*, *supra*, 116 Cal.App.2d at p. 632.) But that does not mean that the non-appealing party is entitled to collect the "value of the use and occupancy" if it subsequently turns out that the *potential* injury from the pendency of the appeal never ripened into any *actual* injury. Indeed, to condition a party's right to appeal upon its agreement to pay a bond, even when the bond ends up being unnecessary to compensate the non-appealing party for injuries related to the pendency of the appeal, is to wrongfully impose what amounts to a mandatory "appeal tax" that impermissibly burdens the "sacred

and inviolable" right to appeal. (*Wuest v. Wuest* (1942) 53 Cal.App.2d 339, 345 [trial court may not require an appealing party to stipulate to certain concessions before seeking appeal]; cf. *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650-651 [courts may impose sanctions for "prosecuting *frivolous* appeals"].) We decline to construe the text of section 917.4 in a manner that would lead to such an "unreasonable" and "absurd result." (*Barnes*, *supra*, 147 Cal.App.3d at p. 766.) What is more, because the amount at which the bond is *fixed* may logically differ from the amount which may ultimately be collected on the bond, we reject Daaus's related argument that the Mironers are judicially estopped from contesting Daaus's efforts to collect on the bond because they previously represented that the bond should be fixed at $528,000.

Third, Daaus asserts that the Mironers had no right to redeem Daaus's outstanding judgment by paying it off. Whether the Mironers had a *right* to do so is, at this point, a wholly academic question given that the Mironers *did* do so and, more to the point, given that Daaus allowed the Mironers to do so by accepting and then cashing their check.

Lastly, Daaus contends that the Mironers forfeited any right to object to Daaus's motion to collect on the bond because Daaus's motion was directed *to the surety* and *the surety* never responded to that motion. This contention ignores that the pertinent statute allows either "the principal *or* sureties" to oppose the motion (§ 996.440, subd. (d)), and the Mironers—as the principals—opposed the motion. Because "or" means "or" (e.g., *Kobzoff v. Los Angeles County Harbor/UCLA Medical Center* (1998) 19 Cal.4th 851, 861), the Mironers' objection sufficed.

DISPOSITION

The order is affirmed. The Mironers are entitled their costs on appeal.

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_____, J.
HOFFSTADT

We concur:

_____, P.J.
LUI

_____, J.
CHAVEZ